UNITED
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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 633

Case No. 643: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Ioan Voicu;

Whereas, on 14 January 1992, Mohammed Ali Al-Atraqchi, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"1. To find that the recruitment of an external candidate violates staff regulation 4.4...

...

3. To find that the Applicant did not receive the fullest consideration with regard to [his] candidacy for the post D-1, Chief, Industry, Energy and Environment Statistics Branch, Statistical Office, International Economic and Social Affairs (DIESA), Post No. UNA-06540 E-D1-001.

4. To find that the Secretary-General's refusal to accept the unanimous report of the JAB [Joint Appeals Board] contradicts his commitment to accept all unanimous reports of the JAB, provided that they do not impinge on any major questions of law or principle.

5. To find that the Representative of the Secretary-General cannot introduce, through his letter to the Applicant dated 20 November 1991, a new issue (namely that ST/AI/338, Add. 5, para. 32(a),

enabled the Secretary-General to resort to external candidates) which was never submitted to the Joint Appeals Board.

6. To conclude that the selection process which awarded Mr. Osborne Jackson a promotion to D-1 was, therefore, null and void.

7. To conclude that Applicant was the most qualified of all candidates.

8. And consequently, to order:

(a) Respondent to promote Applicant to the D-1 level, retroactively to the date when Mr. Osborne Jackson was promoted to D-1.

(b) Retroactive wages and benefits at the D-1 level less wages and benefits received at the P-5 level from no later than the date of confirmation of the promotion which was denied to Applicant.

(c) Respondent to grant Applicant, in case this Tribunal does not wish to order specific performance, damages equal to two years net base salary.

(d) Additional damages for the continuous hinderance to the development of Applicant's career."

Whereas the Respondent filed his answer on 27 July 1992;

Whereas the Applicant filed written observations on 7 October 1992;

Whereas, on 4 and 16 June 1993, the Tribunal put questions to the Respondent, to which he provided answers on 8 and 21 June 1993;

Whereas, on 15 and 24 June 1993, the Applicant commented on the Respondent's submissions;

Whereas on 28 June 1993, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn consideration of the case;

Whereas, on 19 October 1993, the Tribunal put questions to the Respondent, to which he provided answers on 22 October 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level, as an Associate Statistician, with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent appointment and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs, as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer.

The Administration announced, in Internal Vacancy Announcement 90-M-ESA-006-NY, the vacancy of the D-1 post of Chief, Industry, Energy and Environment Statistics Branch in the Department of International Economic and Social Affairs (DIESA), with the deadline for applications being 19 March 1990. The post was advertised internally, within the Secretariat, as well as externally. The Applicant and other staff members, as well as some external candidates, applied for the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment System (VMS) established according to the Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date (and its addenda).

All applications for the post of Chief, Industry, Energy and Environment Statistics Branch were forwarded to the Appointment and Promotion Board. The Board, at its 1600th meeting held on 1 November 1990, short-listed, in alphabetical order, four candidates, including the Applicant and decided that their names should be transmitted to the Department for final selection. On 4 January 1991, the Office of Human Resources Management (OHRM) informed the Applicant that, after the review by the Appointment and Promotion Board, he had not been selected for the post.

On 1 February 1991, the Applicant requested the Secretary-General to review the administrative decision of 4 January 1991, stating, inter alia, that his academic background and work experience in the Statistical Office were "superior" to those of the staff member selected for the post and that the decision not to promote him to the D-1 level against the post in question was contrary to staff regulations 4.2 and 4.4. In a reply, dated 12 February 1991, the Chief of the Administrative Review Unit, OHRM, informed the Applicant that the review he had requested would be conducted, and that, if he received no answer to this letter within a month, he could file an appeal with the Joint Appeals Board (JAB).

On 11 April 1991, having received no reply from the Secretary-General, the Applicant lodged an appeal with the JAB. The Board adopted its report on 13 November 1991. Its conclusions and recommendations read, in part, as follows:

> "Conclusions and Recommendations
>
> 23. ...the Panel concludes that, guided by the interpretation enunciated in UNAT's Judgement No. 537 (Upadhya), it cannot support the Appellant's arguments regarding the invalidity of the VMS and the review conducted in accordance therewith. Furthermore, the Panel cannot enter into the question of evaluation and comparison of the Appellant's qualifications with those of the selected candidate, nor does it find any basis for assuming that fullest regard had not been given to the candidature of the Appellant. It concludes, however, that VMS was used in this case to fill a vacancy with an external candidate which is not in line with the goals of the VMS.
>
> 24. In view of the aforesaid the Panel recommends that the Appellant be awarded a compensation corresponding to one month net salary.
>
> 25. The Panel makes no further recommendation in support of the appeal."

On 20 November 1991, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has decided, in accordance with such report, to maintain the contested decision. At the same time, he cannot accept the Board's recommendation for payment of one month's salary as compensation for the following reasons.

The Secretary-General may, in the interest of securing the highest standards of efficiency, competence and integrity, exercise his discretionary authority to fill a post through external recruitment. This is in accordance with staff regulations 4.2 and 4.4. The administrative instruction governing vacancy management, ST/AI/338, expressly envisages in paragraph 32 of its Addendum 5, of 2 November 1988, certain situations where posts are not to be filled through the full procedures of the vacancy management and staff redeployment programme. The procedure applied in your case is set out in subparagraph 32(a) of this Addendum and is designed to guarantee that internal candidates who may be qualified can still be considered jointly with external candidates."

On 14 January 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The selection of an external candidate for the post violates staff regulation 4.4., which establishes priority in filling vacancies for staff members already in the service of the United Nations.

2. The Applicant's candidacy did not receive the "fullest consideration", required under staff rule 104.14.

3. The Secretary-General's refusal to accept the unanimous report of the JAB contradicts his commitment to accept all unanimous reports of the JAB provided that they do not impinge on any major questions of law or principle.

Whereas the Respondent's principal contentions are:

1. The International Civil Service Commission staff is appointed by the Secretary-General; they are officials of the United Nations and therefore cannot be considered as external candidates.

2. VMS allows for recruitment and promotion of external candidates for particular posts.

3. The Applicant has no right to promotion but only to due consideration of his candidacy, which was given. Evaluation of relative merits of staff members is within the discretion of the Secretary-General.

4. The temporary suspension of staff rule 104.14, following the introduction of the VMS, did not result in denying the Applicant the right to full consideration for promotion.

5. The Secretary-General's obligation is to take a decision on the appeal. As a matter of policy, unanimous recommendations of the JAB are accepted by him if they do not impinge on matters of law or principle.

The Tribunal, having deliberated from 3 June to 24 June 1993 in Geneva and from 19 October to 19 November 1993 in New York, now pronounces the following judgement:

I. The Applicant applied for the post of Chief, Industry, Energy and Environment Statistics Branch in the Department of International Economic and Social Affairs (DIESA). The selection for the post was to be conducted under the Vacancy Management System (VMS). Consequently, the applications were considered by the Appointment and Promotion Board (APB) and a short-list which included the Applicant's name was drawn up. DIESA considered the short-list and selected a candidate who was a staff member of the International Civil Service Commission (ICSC).

II. The Applicant initiated a recourse procedure against his non-selection. Not having received an answer, he appealed to the

JAB, which recommended a month's salary as compensation on the ground that "VMS was used in this case to fill a vacancy with an external candidate, which was not in line with the goals of the VMS". The Secretary-General subsequently decided not to follow the JAB's recommendation and invoked administrative instruction ST/AI/338/Add.5, paragraph 32(a), claiming that, according to its provisions, he had authority to appoint external candidates under the VMS.

III. The Applicant, thereupon, requested the Tribunal to "find that the recruitment of an external candidate violates staff regulation 4.4". In order to dispose of this plea and of a related question raised by the Applicant, with respect to administrative instruction ST/AI/338, the Tribunal had to determine whether the former ICSC staff member was treated as an external candidate. During the proceedings, the Respondent, alternatively, claimed that he was an external and an internal candidate: external in the final decision contained in the letter of 20 November 1991 and, also, in paragraph 7 of a memorandum by Counsel for the Respondent, dated 29 October 1992: internal, on page 2 of the memorandum by Counsel for the Respondent, dated 8 June 1991. The Tribunal is of the view that, the administrative decision it is called upon to examine is contained in the above-mentioned letter, dated 20 November 1991. That letter dealt with the successful candidate as an external candidate. For that reason alone, the Tribunal will consider the case on that basis.

IV. As to the Applicant's argument that staff regulation 4.4 has not been observed, it is the Tribunal's opinion that, inasmuch as the short list submitted by the APB in compliance with the VMS, included the Applicant, as well as others in the service of the UN, the requirements of staff regulation 4.4 have been met.

Moreover, the norm invoked by the Respondent in his decision, i.e. administrative instruction ST/AI/338/Add.5, paragraph 32(a), provides for exceptions in implementing the VMS in certain cases, including the following:

> "(a) Posts requiring specialized or technical skills not present or in short supply among existing staff members. Where internal candidates are not available to fill such posts and it is determined that the posts are essential to the delivery of mandated programmes, an approval for external recruitment will have to be sought. When an approval for recruitment is granted, and external vacancy announcement will be issued and posted for which internal candidates may nevertheless apply".

Under paragraph 33 of that instruction, it is for OHRM to decide when a post falls within one of the exceptions mentioned in paragraph 32(a).

V. On 7 December 1989, the Director of the Statistical Office requested the Administrative Officer, Executive Office, DIESA, to open post UNA-06540-E-D1-001 for external recruitment, pointing out that the retirement of several staff members would otherwise "have a serious detrimental effect on the capability of the Office". In consequence, the vacancy was announced by OHRM as being open to both external and internal candidates, a decision which, in the Tribunal's view, constitutes a valid administrative measure pursuant to paragraph 33 of administrative instruction ST/AI/338/Add.5.

VI. The Applicant has also charged that favouritism was shown towards the successful candidate by the then Assistant Secretary-General, OHRM, in arranging to have the ICSC staff member considered as an internal candidate and in calling this directly to the attention of the Head of the department. The Tribunal has examined this issue closely. Although it was concerned regarding what appeared to be a last minute arrangement made by the Assistant

Secretary-General, OHRM, and the ICSC which might have been of assistance to the successful candidate, the Tribunal was unable to find that the Applicant's charge of favouritism was substantiated.

VII. The Applicant, in his pleas, requests the Tribunal to rule that: "the argument that the Applicant did not meet the requirements of Article 101, paragraph 6 of the Charter is not only totally unwarranted but also insulting to the Applicant and all other internal candidates". The Tribunal finds no basis for such a request, which should therefore be dismissed.

VIII. The Applicant further requests the Tribunal to find that he had not "received the fullest consideration with regard to [his] candidacy" for the post for which he applied. In this respect, the Tribunal recalls its Judgement No. 565, Al Atraqchi, in which it ruled that the fact that an applicant's name was included in the short-list forwarded by the APB to OHRM, clearly indicated that he or she had been fully considered. As for the final selection, the Tribunal further recalls its Judgement No. 565:

> "V. ...The VMS selection process according to ST/AI/338, is conducted in two steps: the applications are first considered by the APB and a short-list is drawn up and submitted to the head to the department concerned; then, the head of the department makes his choice. As far as the first step is concerned, detailed guidelines, to be followed by the APB, are set forth in Chapter II of ST/AI/338. Once the APB concludes its review, the decision rests with the head of the department. For this second phase, there are no guidelines. Under Chapter III of ST/AI/338, the head of the department concerned is free to choose any short-listed candidate he judges to be best qualified for the job."

IX. The Applicant also requests the Tribunal to find that "the Secretary-General's refusal to accept the unanimous report of the

JAB contradicts his commitment to accept all unanimous reports of the JAB, provided that they do not impinge on any major questions of law or principle."

In connection with this plea, the Tribunal recalls its Judgement No. 562, Al Jaff (1992), paragraph VIII, in which it ruled that:

> "In the Tribunal's view, the Secretary-General has only adopted a policy from which he can depart. Thus the relevant rules concerning the advisory nature of the JAB recommendations remain unchanged."

X. The Applicant further requests the Tribunal to rule that the representative of the Secretary-General could not rely, as he did, on administrative instruction ST/AI/338/Add.5, paragraph 32(a) when he decided not to follow the JAB's recommendations. The Applicant contends that inasmuch as this text had not been invoked before the JAB, it could not be invoked later before the Tribunal. The Tribunal is unable to share the Applicant's view on this issue. The Respondent clearly stated before the JAB in paragraph 13 of his submission, that "In accordance with paragraphs 2, 4 and 32 of ST/AI/338/Add.5, the post was advertised internally and externally".

Furthermore, even if such administrative instruction had not been invoked before the JAB, it is the Tribunal's view that the Respondent would not have been barred from invoking it at a later stage. Legal texts may be invoked before an appellate body, at any time.

XI. The Applicant also requests the Tribunal to "conclude that the selection process that awarded Mr. Osborne Jackson promotion to D-1 was null and void". In this respect, the Tribunal notes that the point at issue is not the successful candidate's promotion to the D-1 level but his selection for post UNA-06540-E-D1-001. Both exercises are closely connected but, they are still clearly

distinguishable and occurred at different times. The Applicant has challenged the selection process and it is this challenge on which the Tribunal is called upon to rule.

XII. Although the promotion of the candidate is not properly before it, the Tribunal cannot but note with great concern that it was carried out without duly observing the General Assembly's resolution 2480B, that requires "adequate and confirmed knowledge of a second language" for promotion to certain grades.

The Respondent conceded in his memorandum of 8 June 1993, that the successful candidate "did not possess a proficient knowledge of a second language at the time of his promotion to the D-1 level". He claimed that the requirement of a second language had been duly waived, according to the provisions of the General Assembly's resolution. In the Respondent's view, the mere fact of the selection of the candidate implied the waiving of the language requirement. The Tribunal does not share this view.

It appears to the Tribunal that the General Assembly resolution requires a determination by the Secretary-General (or by someone under a proper delegation of authority) that, with regard to the post in question, it is in the interest of the Organization, for specified reasons, to dispense with the second language requirement. If there is such a waiver, it should be made known, especially to all potential candidates for the post; this is not done when a vacancy announcement merely states that a second language is desirable. Although this matter does not alter the outcome of the present case, the Tribunal feels bound to invite the attention of the Respondent to the importance of properly implementing the General Assembly's resolutions.

XIII. Finally, the Applicant calls upon the Tribunal to conclude that he was the "most qualified of all candidates". In this respect, the Tribunal recalls its consistent jurisprudence and reiterates that it is beyond its competence to compare the merits of different candidates.

XIV. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Ioan VOICU
Member

New York, 19 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary